

REMARKS

OVERVIEW

Claim 10 has been objected to due to a grammatical informality. Applicant has amended the claim as suggested by the Examiner so as to overcome this informality. Accordingly, the object to claim 10 is moot.

Claims 1, 9 and 10 have been rejected under 35 U.S.C. § 102 as being anticipated by Vilsmeier. Claims 2-8 and 11-16 have been rejected under 35 U.S.C. § 103 as being obvious over Vilsmeier. Applicant respectfully traverses these rejections, and requests reconsideration of the claims, as amended.

THE § 102 REJECTION MUST BE WITHDRAWN

Independent claims 1 and 10 have been amended to provide that the sheet of thermoplastic material has a perimeter edge and is free from additional strips of material. Claims 1 and 10 further provide for a U-shaped frame attached to and extending around a portion of the perimeter edge of the sheet. Claims 1 and 10 have also been amended to provide that the restraint member has "only a single layer of thermoplastic material throughout the restraint member." The Vilsmeier patent does not meet these limitations of claims 1 and 10.

More particularly, as shown in Figures 1A, 1B, 1C, and 6 of Vilsmeier, the patient restraint member includes multiple layers 10, 13 and 14. The strips 13, 14 are layered beneath the sheet material 10. The layers 10, 13 and 14 are each a thermoplastic material, as described in Vilsmeier at column 5, line 64 - column 6, line 20. Thus, the Vilsmeier patent does not have a sheet which is free of additional strips and wherein the restraint member has only a single layer of thermoplastic material throughout, as required by claims 1 and 10.

Furthermore, Vilsmeier does not have the U-shaped frame attached to and extending around a portion of the perimeter edge of the thermoplastic sheet of material, in accordance with claims 1 and 10. Rather, Vilsmeier has opposite straight rails 31 extending along opposite sides of the mask.

Finally, the Examiner's interpretation of the Vilsmeier drawing Figure 1 is incorrect. At column 5, line 64 - 66, Vilsmeier clearly explains that the thermoplastic material is perforated "in a netlike manner." A net does not have solid bands of non-perforated material, as required by claim 1. The non-perforated areas shown in the central portion of the sheet 10 of Figure 1A is merely a drawing convention so that the draftsman need not draw small holes across the complete area of the sheet 10. Vilsmeier has no description regarding the non-perforated area of Figure 1A. Furthermore, the mask material 10 in Figure 6 does not have any relatively large, unperforated central areas. Thus, Figure 1A, as interpreted by the Examiner, is a misrepresentation of the Vilsmeier invention, which unequivocally states that the thermoplastic material is perforated in a netlike manner, which would be understood by persons having ordinary skill in the art to mean that the sheet 10 is fully perforated between the opposite edges, without enlarged solid bands, as asserted by the Examiner.

Therefore, claims 1 and 10 distinguish over Vilsmeier so as to be in proper form for allowance. Claims 2-9 depend from claim 1 and claims 11-17 depend from claim 10, and should be allowable as depending from an allowable base claim.

THE § 103 REJECTION IS IMPROPER

The Examiner's § 103 rejection of the dependent claims is improper, and must be withdrawn since it does not create a *prima facie* case of obviousness. On page 4 of the Office

Action, the Examiner states that it would have been "an obvious matter of design choice to one of ordinary skill in the art to have made the thermoplastic sheet with the varying solid band configurations, because Applicant has not disclosed that such configurations provide an advantage, are used for a particular purpose, or solve a stated problem." Design choice is the wrong test for obviousness.

The Court of Appeals for the Federal Circuit has clearly explained that an obviousness rejection must be based upon objective evidence of record. In re Lee, 277 F.3d 1338, 1343 (Fed. Cir. 2002). Subjective belief and unknown authority is insufficient. Id. at 1343-44. Common knowledge or common sense is an erroneous basis upon which to assert obviousness. Id. at 1344. A rejection based upon "design choice" without a teaching or suggestion in the prior art is inherently improper. Therefore, the § 103 rejection must be withdrawn.

CONCLUSION

In view of the foregoing, Applicant respectfully requests that a Notice of Allowance be issued.

No fees or extensions of time are believed to be due in connection with this amendment; however, consider this a request for any extension inadvertently omitted, and charge any additional fees to Deposit Account No. 26-0084.

Reconsideration and allowance is respectfully requested.

Respectfully submitted,



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